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Spin Doctor: Court Strikes Down Wind Permitting Freeze As Illegal

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On Monday, the U.S. District Court for the District of Massachusetts struck down the freeze on federal permits for wind energy projects — a central component of the Wind Presidential Memorandum (the Wind Order) issued on the first day of the current administration. Judge Patti Saris's opinion held that the Wind Order is arbitrary and capricious and contrary to law under the Administrative Procedure Act (APA), and directed that it be vacated in full — meaning the ruling applies nationally. The decision was previewed in the court's preliminary order in July indicating that the Wind Order was on shaky legal ground, citing a lack of administrative record to support the Wind Order and precedent from cases involving analogous moratoriums for offshore oil and gas. Despite the major win for wind, though, there is still significant uncertainty regarding how this administration will respond to the ruling and how it will affect wind energy permitting going forward.

Seventeen states, the District of Columbia, and ACE-NY, a New York-based renewable energy trade association, initially filed for a preliminary injunction against the Wind Order on May 5. The judge initially assigned to the case, William G. Young, converted the case to an expedited merits proceeding and ruled in early July that the states and ACE-NY had standing to sue and that the Wind Order constituted a final agency action ripe for challenge under the APA. After some delay, the case was reassigned to Judge Saris in early November; acknowledging the importance of the case in her initial hearing, she moved quickly to rule on the merits.

After affirming Judge Young's rulings regarding standing and final agency action (and slapping down the government's arguments as "tilting at windmills"), Judge Saris held decisively that the Wind Order was arbitrary and capricious on several grounds. She first spent significant time explaining why recent Supreme Court precedent did not allow agencies to duck APA review simply by saying they were following presidential instructions, in an apparent effort to insulate her opinion from potential high court reversal. Then, noting the "sparsity" of the administrative record, she held that that the government had failed to adequately articulate its change in position from prior administrations' policy of making decisions on wind energy projects — observing that "[w]hatever level of explanation is required when deviating from longstanding agency practice, this is not it." In so ruling, Judge Saris cited repeatedly to several recent cases arising from Louisiana federal courts that struck down Democratic administrations' efforts to pause permitting and leasing for oil and gas production and transportation infrastructure.

Judge Saris also held that the government had "failed to account for reliance interests engendered by their previous policy of adjudicating wind permit applications." Finally, she ruled that the government had violated Sections 555(b) and 558(c) of the APA, which require agencies to make decisions "within a reasonable time." In so doing, she held that the Wind Order could not be saved simply by instructing agencies to implement it

“consistent with applicable law,” and stated that “[t]he proof is in the pudding: No permits have issued since the Wind Order was promulgated[.]”

Judge Saris’s vacatur of the Wind Order is expressly intended to apply to all wind energy projects irrespective of geographic location; the opinion noted that the Supreme Court’s bar on nationwide injunctions in *Trump v. CASA, Inc.* does not affect remedies in APA challenges. It is expected that an upcoming December 15 status conference will provide more detail on the scope of the final judgment and remedy.

It is unclear at this point what real-world effects this ruling will have for renewable energy permitting. Since the Wind Order was first issued, this administration has issued numerous directives aimed at hindering not just wind but also solar projects, as well as ramping up targeted enforcement against wind projects. As most of these orders do not rely on the Wind Order, Judge Saris’s ruling is not expected to directly affect them.

For questions or to discuss the impacts of this and other renewable energy permitting developments, contact Troutman Pepper Locke’s Environment + Natural Resources Practice Group attorneys.

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